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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1283

PAULA POE, RITA ROE, NANCY COE, PATRICIA NOE, PAMELA HARRIS, DR. LYNN P. CARMICHAEL, and all others similarly situated,

Appellants,

v.

RICHARD E. GERSTEIN, WILSON T. SOWDER, ROBERT L. SHEVIN, their agents, those acting in concert with them, and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM OR DISMISS

ROBERT L. SHEVIN
Attorney General
State of Florida

J. ROBERT OLIAN
Assistant Attorney General
State Office Building (530)
1350 Northwest 12th Avenue
Miami, Florida 33136

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Introduction

The defendants, Gerstein and Shevin, officials of the State of Florida have previously submitted their jurisdictional brief in this

cause. Two issues were presented to this Court for review in the posture of a direct appeal under 28 U.S.C. 1253, or, in the alternative, as a Rule 20 petition for writ of certiorari.

First, the defendants have urged this Court to review the finding of the Three-Judge Court that the "parental consent" provision of Florida's abortion statute is constitutionally invalid. Second, we have urged this Court to review the finding of the lower court that the "spousal consent" provision of Florida's abortion statute is invalid.

The plaintiffs in the court below have submitted a motion to dismiss or affirm in response to the defendants' jurisdictional brief. They have also submitted a jurisdictional brief claiming that several additional portions of the ruling below constitute error. This motion is in response to the jurisdictional brief filed by the plaintiffs.

The basic position presented in this motion is that this Court should affirm the lower court's refusal to grant injunctive relief of any type. It is hereby urged that this Court should also consider summary reversal of the Three-Judge Federal Court in regard to granting declaratory relief in favor of the plaintiffs.

ARGUMENT

I

THE TRIAL COURT WAS CORRECT IN DENYING INJUNCTIVE RELIEF TO PLAINTIFFS COE AND NOE IN REGARD TO THE "SPOUSAL CONSENT" AND "PARENTAL CONSENT" PROVISIONS OF THE FLORIDA STATUTE.

(Dealing with Issues I, II and VIII raised by the plaintiffs in their jurisdictional brief.)

Although this Court struck down the abortion statutes of two states in Roe v. Wade, 410 U. S. 113 (1973) and Doe v. Bolton, 410 U. S. 179 (1973), injunctive relief was denied to the particular plaintiffs. That position was obviously consistent with this Court's decision in Younger v. Harriss, 401 U. S. 37 (1971). Therefore, the District Court's decision to deny injunctive relief was clearly correct and should be summarily affirmed.

At the same time, the Three-Judge Panel did grant declaratory relief as to the two provisions in question. The order cited as authority this Court's decisions in Roe and Doe, supra. In view of that fact, affirmance of the denial of injunctive relief could be coupled with summary reversal of the declaratory holding.

A summary reversal would be appropriate for several reasons. In Roe and Doe, this Court did not establish any principles of law controlling the issues of the rights of husbands and parents. Furthermore, this Court pointed out in Roe that there is no absolute right to privacy which would automatically outweigh long-standing legal rights and interests of others:

> "The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U. S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (vaccination); Buck v. Bell, 274 U. S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (sterilization).
>
> We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered

Likewise, this Court has always recognized the right of the state to define the marital relationships and the rights and responsibilities which attach thereto. Maynard v. Hill, 125 U. S. 190 (1888), Estin v. Estin, 335 U. S. 541 (1948); Haddock v. Haddock, 201 U. S. 562 (1906); Loving v. Virginia, 388 U. S. 1 (1967). The Roe and Doe decisions do not abrogate the right of the state to regulate the marital relationship. Thus a husband's interest in his prospective child cannot be negated by a mere reference to this Court's decisions in Roe or Doe.

Third, just as Younger settled the issue regarding the request for injunctive relief, Samuels v. Mackell, 401 U. S. 66 (1971), as applied in Becker v. Thompson, 459 F.2d 919 (1972), was controlling in regard to the requested declaratory relief. That relief was, therefore, inappropriately granted.

Therefore, the District Court was quite right in denying injunctive relief, and their decision in that regard should be affirmed. Further, such affirmance should be combined with a summary reversal of that portion of the order which declared the "spousal consent" and parental consent requirements to be unconstitutional.

II

THE COURT'S REFUSAL TO GRANT INJUNCTIVE RELIEF AS TO THE APPROVED FACILITY CLAUSE AND THE USE OF ADVERTISING CLAUSE SHOULD BE SUMMARILY AFFIRMED.

(Dealing with Plaintiffs'Issues Nos. III and IV.)

The defendants, officials of the State of Florida, explicitly abandoned any defenses regarding the approved facility requirements, and the restrictions upon advertising contained within the Florida abortion statute. The officials involved clearly indicated, through counsel, that there would be no attempt to enforce either of those provisions. Therefore, those issues were rendered moot and injunctive relief was not required. See Hammond v. University of Tampa, 344 F.2d 351 (5th Cir. 1965).

III

THE DISMISSAL OF PLAINTIFFS POE AND ROE SHOULD BE SUMMARILY AFFIRMED.

(Dealing with Plaintiffs' Issues Nos. V and VI.)

Neither of the above plaintiffs presented a justiciable controversy to the court below and, therefore, their complaints were ap-

propriately dismissed. A controversy might have existed as to the Florida abortion statute in question if either plaintiff had asked for consent (of the husband in one instance and the parents of the unmarried minor in the other). However, neither of those plaintiffs asked for the consent of the appropriate party (see paragraphs 40 and 44 of the original complaint).

If consent had been requested and denied, then a challenge to the Florida Statute might have been appropriate. Since there was no allegation in either case that consent had been asked for and had been denied, no threshold issue was created sufficient to establish a justiciable controversy.

IV

DISMISSAL OF PLAINTIFF HARRIS SHOULD BE SUMMARILY AFFIRMED.

(Dealing with Plaintiffs' Issue No. VII.)

Plaintiff Pamela Harris sought to challenge Rule 10D-0.05 of the Department of Health and Rehabilitative Services of the State of Florida. That rule was entitled "Use of Advertising" and prohibited public advertising of available abortion facilities. The same rule also stated:

> "The Division of Health will furnish lists of licensed facilities to physicians and health agencies on request."

Plaintiff Harris worked for a health agency as a counselor. Obviously, the very rule which she challenged made available to her the information which she sought to disseminate. The rule, on its face, would appear to specifically authorize counselors to communicate information regarding those places where abortions could be obtained. The rule pertaining to advertising had no application to plaintiff Harris. Therefore, her interest does not meet the standing requirements as defined by this Court in Flast v. Cohen, 392 U. S. 83 (1968). Furthermore, the issue is now moot insofar as the defendants stated to the court below that the rule would no longer be enforced.

CONCLUSION

For the reasons set forth above, the defendants move this Court to affirm those portions of the order being appealed by the plaintiffs below. The defendants also urge summary reversal of the lower court in regard to the declaratory relief which was granted.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General
State of Florida

J. ROBERT OLIAN
Assistant Attorney General
State Office Building (530)
1350 Northwest 12th Avenue
Miami, Florida 33136

Attorney for Appellees

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